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No. 386

In the Supreme Court of the United States

October Term, 1935.

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, *Appellants,*

vs.

R. O. JENKINS, *Appellee.*

Appeal From the Supreme Court of the State of Arkansas.

BRIEF OF APPELLANTS.

NEILL C. MARSH, SR.,
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(b) Even though it be assumed that appellant operated a railroad or a coal mine, the statute will not be construed to apply to an employee, such as appellee, who was not employed in either of those businesses but was employed in the oil and gas business; if construed to apply to such an employee, the statute would contravene the due process clause of the Fourteenth Amendment to the Federal Constitution	20
(c) In order to bring his case within the valid provisions of the statute, the burden was upon appellee to allege and prove that appellant was a railroad company or was engaged in mining coal, which he failed to do—he did not even suggest that such were the facts	22
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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1935.

No. 386

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, ***Appellants,***

vs.

R. O. JENKINS, ***Appellee.***

Appeal From the Supreme Court of the State of Arkansas.

BRIEF OF APPELLANTS.

PART I.

Jurisdiction.

There has heretofore been filed herein a statement as to jurisdiction, as required by Rule 12, Paragraph 1, of this court, a statement of appellee making against jurisdiction and motion to dismiss or affirm, and brief of appellants in opposition to motion to dismiss or affirm. Inasmuch as the clerk has advised that further consideration of jurisdiction has been postponed to the hearing on the merits, we have deemed it proper to consolidate herein and amplify some-

what the contentions of appellants with respect to the jurisdiction of this court.

The United States Fidelity & Guaranty Company joined in this appeal because of the fact that it was surety on the supersedeas bond of appellant Phillips Petroleum Company on the appeal to the Supreme Court of Arkansas and the judgment of that court was against the surety on the bond (R. 87) as well as the Phillips Petroleum Company; hence, the term "appellant" used in this brief will refer to Phillips Petroleum Company alone. Judgment was also rendered against Joe H. Myers, but he gave no supersedeas bond and has not appealed from said judgment. A severance was had as to Myers. (R. 96)

The Decision Below.

This is an appeal from the judgment of the Supreme Court of Arkansas, modifying and affirming a judgment for damages in favor of appellee and against appellant and upholding the validity of section 7137, Crawford & Moses Digest of the Statutes of Arkansas, as against the contention that the same, insofar as it abrogates the common law fellow-servant rule as to all corporations, contravenes the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. The opinion is reported in 190 Ark. 964, 82 S. W. (2d) 264, and is found in the printed record herein at page 88.

Statement as to Jurisdiction.

1. The statutory provisions believed to sustain the jurisdiction are:

Section 237 (a) of the Judicial Code (Title 28, U. S. C. A., section 344 (a)), which provides:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

An act approved January 31, 1928, chapter 14, section 1, 70th Congress, 45 U. S. Statutes at Large, page 54 (Title 28, U. S. C. A., section 861 (a)), which provides:

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

2. The statute of the State of Arkansas, the validity of which is involved, is section 7137, Crawford & Moses Digest of the Statutes of Arkansas, reading as follows:

> "Hereafter all railroad companies operating within this state, whether incorporated or not, and all corporations of every kind and character, and every company whether incorporated or not, engaged in the mining of coal, who may employ agents, servants or employees, such agents, servants or employees, being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employee or servant, resulting from the careless omission of duty or negligence of such employer, or

which may result from the carelessness, omission of duty or negligence of any other agent, servant or employe of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer."

Only that portion of the above statute applicable to "all corporations of every kind and character" is involved, the appellant not being a railroad company or engaged in the mining of coal.

3. The date of the judgment of the Supreme Court of Arkansas is May 6, 1935. (R. 87) Appellant filed a petition for rehearing which was overruled on June 10, 1935. (R. 93) The petition for appeal was presented to the Chief Justice of the Supreme Court of Arkansas on June 24, 1935. (R. 97)

4. The action was filed in the Circuit Court of Ouachita County, Arkansas, Second Division, by appellee against appellant and Joe H. Myers, for the recovery of damages for personal injuries alleged to have been sustained by appellee as the result of negligence of Joe H. Myers while both appellee and Myers were engaged in the performance of their duties for appellant. (R. 3) The complaint alleged that appellant was a foreign corporation authorized to do business in the State of Arkansas, and was engaged in the business of operating and producing oil and gas and laying and operating pipe lines for the transportation of oil and gas, and that plaintiff was in the employ of appellant in connection with the operation of its oil and gas wells and pipe lines in the Counties of Ouachita and Union, State of Arkansas, in the capacity of a laborer and "that defendant, Joe H. Myers, was at all times mentioned herein an employee of

defendant Phillips Petroleum Company and a fellow-servant of plaintiff". (R. 3, 4) It was further alleged that appellee and Myers were engaged in carrying a joint of pipe in the performance of their duties for appellant under the instructions of their foreman, Jim Forsyth, appellee carrying the front end and Myers carrying the rear end. Myers is alleged to have shifted the pipe from one shoulder to the other, thereby jerking the pipe causing appellee to become overbalanced and to step in a hole in the ground and fall. (R. 4) No other act of negligence was charged. On the contrary, it was specifically alleged "that the injuries to plaintiff were caused solely on account of the negligence and carelessness of the defendant Joe H. Myers in the following particulars, to-wit: * * *", and, further, "That the injuries to the plaintiff were caused solely on account of the overt acts of the said Joe H. Myers as above set out and that at the time such acts were committed by the said Joe H. Myers he was a fellow-servant of the plaintiff, both being in the employ of the defendant Phillips Petroleum Company." (R. 6) The evidence of appellee tended to support the allegations of his complaint. It was not charged and there was no evidence to prove that appellant was a railroad company or engaged in the mining of coal. The only applicable part of the foregoing statute therefore was that portion relating to all "corporations of every kind and character."

For reversal of the judgment appellant relies upon the following cases:

Gulf, C. & S. F. R. Co. v. *Ellis,* 165 U. S. 150, 41 L. ed. 666;

Cotting v. *Kansas City Stock Yards Co.,* 183 U. S. 79, 46 L. ed. 92;

Kentucky Finance Corporation v. *Paramount Auto*

Exchange Corporation, 262 U. S. 544, 67 L. ed. 1112;

Power Mfg. Co. v. *Saunders,* 274 U. S. 490, 71 L. ed. 1165;

Quaker City Cab Co. v. *Pennsylvania,* 277 U. S. 389, 72 L. ed. 927;

Frost v. *Corporation Commission of Oklahoma,* 278 U. S. 516, 73 L. ed. 483;

Ballard v. *Mississippi Cotton Oil Co.,* 81 Miss. 507, 34 So. 533, 62 L. R. A. 407, 95 A. S. R. 476;

Bedford Quarries Co. v. *Bough,* 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (n.s.) 418;

Chicago, M. & St. P. R. Co. v. *Westby,* (8 C. C. A.) 178 Fed. 619.

The Constitutionality of the Statute Was Drawn in Question and Was Decided.

The trial court, over the objection and exception of the appellant, gave to the jury "Plaintiff's Instruction No. 1," advising the jury, in substance, that, if Myers was negligent as alleged and appellee was injured thereby, the appellant was liable. (R. 81)

Appellant requested the court to direct the jury to return a verdict in its favor, which request was refused and to which appellant excepted. (R. 79)

Appellant filed a motion for new trial in the trial court within the time allowed by the statutes of Arkansas, in which it was alleged that the court erred in refusing to give an instructed verdict for appellant and erred in giving to the jury plaintiff's Instruction No. 1, specifically charging that section 7137 of Crawford & Moses Digest of the Statutes of Arkansas, which purports to make corporations li-

able for injuries to an employee by the negligence of a fellow-servant, is unconstitutional and void, in that it violates and contravenes section 1 of article 14 of the Constitution of the United States "in that this defendant, a corporation, is a citizen and that it is denied equal protection of the laws in its property rights with other citizens of Arkansas who are individuals in that said law (Sec. 7137, C. & M. Digest) attempts to make it respond in damages to its servant for the negligence of a fellow-servant, but does not impose upon individuals employing servants the duty to respond in damages to a servant for the negligent act of a fellow-servant, and that it is not alleged, nor was any proof offered to show, that this defendant, Phillips Petroleum Company, was operating any railroad, nor that it was engaged in the mining of coal, and in fact it was not engaged in operating any railroad or any coal mine." (R. 11-16)

The motion for new trial was considered by the trial court and overruled. (R. 16) The constitutionality of said statute was briefed and argued in the Supreme Court of Arkansas and the validity of the statute was upheld by that court in the following language:

> "The Petroleum Company, in its motion for a new trial, filed approximately sixty-four days after the return of the verdict, raised the question of the constitutionality of Sec. 7137 of Crawford & Moses' Digest upon which the liability of the Petroleum Company is predicated. This section abrogates the fellow-servant law insofar as it applies to corporations and creates liability as to them for injury to employees caused by negligence of fellow-servants. The contention that said act is unconstitutional is one of the grounds urged for a reversal of the judgment. It is the contention of the appellee that this question was waived by the failure of the de-

fendant in the court below to interpose this defense by demurrer, answer, or other appropriate plea. We pass this contention for the reason that this court, in numerous decisions for a period of more than twenty-five years, has upheld the constitutionality of Section 7137, *supra*, the latest expression being in the case of *Postal Telegraph-Cable Co.* v. *White*, Law Rep., Vol., 56, p. 291, Ms. Op." (R. 89, 90)

In order to get the full purport of the court's decision and to see that the court, in upholding the constitutionality of the statute, was referring to the Federal Constitution, it is only necessary to refer to the case cited, to-wit, *Postal Telegraph-Cable Co.* v. *White*, 190 Ark. 365, 80 S. W. (2d) 633, where it was said:

"Appellant also contends that the statute, section 7144 of Crawford & Moses' Digest, known as the 'fellow servant law,' is void, and that this judgment based thereon must be reversed for that reason. It is argued that this law is void because in conflict with the provision of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall deny to any person within its jurisdiction the equal protection of the law. * * *

"*The prototype of this act (section 7137 of Crawford & Moses' Digest) was said by this court not to offend against the Fourteenth Amendment to the Constitution of the United States more than a quarter of a century ago, and has not been successfully assailed since that time.* See *Ozan Lumber Company* v. *Biddie*, 87 Ark. 587, 113 S. W. 796. This act itself was passed in 1913 and has never been successfully attacked as impinging upon the Fourteenth Amendment of the Constitution of the United States. The act has been upheld in numerous cases by this court against the charge that it was repugnant to the equal protection clause of said amendment. *Caddo River Lumber Co.* v. *Grover*,

126 Ark. 449, 190 S. W. 560; *Arkansas Stave Co.* v. *State*, 94 Ark. 27, 125 S. W. 1001, 27 L. R. A. (n.s.) 255, 140 Am. St. Rep. 103; *Aluminum Co. of North America* v *Ramsey*, 89 Ark. 522, 117 S. W. 568."

In view of the fact that the Supreme Court of Arkansas ruled upon the validity of the statute and held that it did not violate the Fourteenth Amendment to the Federal Constitution, it becomes immaterial whether or not the question was properly and timely raised in the trial court, although, as we shall presently show, the statute was properly and timely drawn in question by the request for an instructed verdict and the exception to plaintiff's Instruction No. 1.

—*Rothschild* v. *Knight*, 184 U. S. 334, 46 L. ed. 573;

San Jose Land & Water Co. v. *San Jose Ranch Co.*, 189 U. S. 177, 47 L. ed. 765;

Manley v. *Park*, 187 U. S. 547, 47 L. ed. 296;

Home Insurance Co. v. *Dick*, 281 U. S. 397, 74 L. ed. 926;

Abie State Bank v. *Bryan*, 282 U. S. 765, 75 L. ed. 690;

Whitney v. *California*, 274 U. S. 357, 71 L. ed. 1095;

Saltonstall v. *Saltonstall*, 276 U. S. 260, 72 L. ed. 565;

Nickey v. *Mississippi*, 292 U. S. 393, 78 L. ed. 1323;

Miedreich v. *Lauenstein*, 232 U. S. 236, 58 L. ed. 584;

Cissna v. *Tennessee*, 246 U. S. 289, 62 L. ed. 720;

Sully, Trustee, v. *American National Bank*, 178 U. S. 289, 44 L. ed. 1072;

Meyer v. *Richmond*, 172 U. S. 82, 43 L. ed. 374;

First National Bank v. *Anderson*, 269 U. S. 341, 70 L. ed. 295;

Chicago, Rock Island & Pac. R. Co. v. *Perry*, 259 U. S. 548, 66 L. ed. 1056.

The foregoing decisions, and numerous others which could be cited, firmly establish the rule that, to the extent the state court passes upon contentions with respect to the Constitution of the United States, whether in its original opinion or upon a petition for rehearing, the decision is subject to review by this court. Thus, in *Nickey* v. *Mississippi, supra*, this court said:

> "So far as the state court discussed these contentions with specific reference to the Constitution of the United States, both in its original opinion, and in an opinion denying the appellants' application for rehearing, they may be reviewed here, notwithstanding the failure of appellants to mention them in their assignment of errors to the state Supreme Court, as required by its rule."

And in *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 72 L. ed. 565, the court said:

> "We may disregard the ambiguity of the trustees' contention below that the statutes were 'unconstitutional', in so far as the state court understood that the Federal Constitution was the basis for the objection and in its opinion sustained the statutes under that instrument * * *. To that extent the case is properly here on writ of error."

In *Rothschild* v. *Knight, supra*, it was held that a federal question raised for the first time on writ of error to the State Supreme Court was sufficient to give the Federal Supreme Court jurisdiction on writ of error.

And in *Meyer* v. *Richmond, supra*, it was held that a constitutional question presented for the first time in a second motion to vacate a judgment on demurrer to the peti-

tion, where overruled by the trial court and affirmed by the Supreme Court, was in sufficient time to give this court jurisdiction to review the judgment.

Not only did the Supreme Court of Arkansas decide the constitutional quention, but the validity of the statute was properly drawn in question even prior to the motion for new trial. It was drawn in question by the request for a directed verdict and by the exception to plaintiff's Instruction No. 1.

In *Satterlee* v. *Matthewson*, 2 Peters 380, 7 L. ed. 458, in an opinion by Mr. Justice WASHINGTON, it was held that a state statute was drawn in question by an instruction of the trial court to the jury that the statute was applicable to the case, where the right of the plaintiff to recover depended upon the statute. In disposing of the contention that there was nothing apparent on the record to raise the constitutional question, the court said:

> "Questions of this nature have frequently occurred in this court, and have given occasion for a critical examination of the above section, which has resulted in the adoption of certain principles of construction applicable to it, by which the objection now to be considered may, without much difficulty, be decided. 2 Wheaton, 363; 4 Wheaton 311; 12 Wheaton, 117. One of those principles is, that if it sufficiently appear from the record itself, that the repugnancy of a statute of a state to the Constitution of the United States was drawn into question, or that that question was applicable to the case, this court has jurisdiction of the cause under the section of the Act referred to; although the record should not, in terms, state a misconstruction of the Constitution of the United States, or that the repugnancy of the statute of the state to any part of that Constitution was drawn into question.

"Now, it is manifest from this record, not only that the constitutionality of the statute of the 8th of April, 1826, was drawn into question, and was applicable to the case, but that it was so applied by the judge, and formed the basis of his opinion to the jury, that they should find in favor of the plaintiff, if in other respects she was entitled to a verdict. It is equally manifest that the right of the plaintiff to recover in that action depended on that statute; the effect of which was to change the law, as the Supreme Court had decided it to be in this very case in the year 1825. 13 S. & R. 133."

Wilson v. *Black Bird Creek Marsh Co.*, 2 Peters 245, 7 L. ed. 412, was a case in which the defendant in error sued the plaintiffs in error for trespass for the breaking of a dam erected by plaintiffs in error pursuant to an Act of the General Assembly of Delaware. The defendants in error filed a plea in which they stated that the dam was in a navigable stream and was wrongfully erected and that they had a right to remove the same. To that plea the defendants in error demurred generally and the demurrer was sustained. There was no specific mention of the Constitution or of any law of the United States. The court, in an opinion by Mr. Chief Justice MARSHALL, held that the constitutionality of the statute was necessarily drawn in question, and that the court in sustaining the right of defendants in error to recover upheld the validity of the statute.

While in the case at bar the court, in its instructions to the jury, said nothing about the statute, the court did tell the jury that appellant should be held liable if its employee Myers was negligent and appellee was injured thereby. That instruction can only be justified by the statute, inasmuch as at common law the master was not liable for in-

juries to his servant caused by a fellow-servant. *Northern Pac. R. Co.* v. *Peterson*, 162 U. S. 346, 40 L. ed. 994; *Graham* v. *Thrall*, 95 Ark. 560, 129 S. W. 532; 39 C. J. 537. Therefore, appellant's exception to that instruction drew in question the constitutionality of the statute.

In *Crowell* v. *Randell*, 10 Peters 368, 9 L. ed. 458, in an opinion by Mr. Justice STORY, all of the previous decisions of the Federal Supreme Court were reviewed and the following conclusion was reached:

> "These are all the cases, it is believed, in which the construction of the twenty-fifth section of the Judiciary Act has been made matter of controversy; and they extend over a period of more than twenty-five years. They exhibit an uniformity of interpretation of that section which has never been broken in upon. They establish, so far as a course of decision can establish, the propositions already stated in the early part of this opinion. The period seems now to have arrived in which the court should, upon a full review of all the cases, with a view to close, if possible, all future controversy on the point, reaffirm the interpretation which they have constantly maintained. It is, that to bring a case within the twenty-fifth section of the Judiciary Act, it must appear upon the face of the record, *1st*. That some one of the questions stated in that section did arise in the State Court. *2nd*. That the question was decided by the State Court, as required in the same section. *3rd. That it is not necessary that the question should appear on the record to have been raised, and the decision made in direct and positive terms, ipsissimis verbis;* but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment. *4th*. That it is not sufficient to show that a question might have arisen or been applicable to the

*All emphasis of quotations herein is ours.

case, unless it is further shown, on the record, that it did arise, and was applied by the State Court to the case."

Many of the cases reviewed in that opinion clearly show that wherever the plaintiff's cause of action is based upon a statute, in the absence of which he would not be entitled to recover, and a recovery is had, the court necessarily decided in favor of the validity of the statute.

In *Murray* v. *Charleston*, 96 U. S. 432, 24 L. ed. 760, the City of Charleston passed ordinances pursuant to state statute, assessing a tax of two cents upon the dollar of the value of all real and personal property in the City of Charleston. The plaintiff was the owner of certain stock of the City of Charleston, which was really a debt of the city. The city deducted from the interest on the stock the amount of the tax. Suit was brought to recover the same by the plaintiff, a resident of Germany. The city answered, setting up the ordinance in justification of its retention of the amount of the tax. Judgment was rendered upon the pleadings for the defendant and was sustained by the Supreme Court of the state. This court held that it had jurisdiction, notwithstanding the fact that there was no formal reference to any clause in the Constitution. The court said that the question was directly presented whether the ordinances could relieve the debtor from its full compliance with its promise to pay the stipulated amount of interest. "The court gave judgment for the defendant, which would have been impossible had it not been held that they have the force of law, notwithstanding the Constitution of the United States, and the Supreme Court affirmed the judgment. Our jurisdiction therefore is manifest."

In *Murdock* v. *Mayor, etc., of Memphis*, 20 Wall. 590, 22 L. ed. 429, 441, the court, in speaking of its jurisdiction under what is now section 237 (a) of the Judicial Code, said:

> "It has been many times decided by this court on motions to dismiss this class of cases for want of jurisdiction, that if it appears from the record that the plaintiff in error raised and presented to the court by pleadings, *prayer for instruction or other appropriate method*, one of the questions specified in the statute, and the court ruled against him, the jurisdiction of this court attached, and we must hear the case on its merits." (Citing authorities.)

In *National Mutual Building & Loan Association* v. *Brahan*, 193 U. S. 635, 48 L. ed. 823, it was held that a federal question is presented in time and in proper form by requested instructions in a trial court asserting rights under the Federal Constitution, which, if they actually exist, entitle the party asserting them to an instruction directing a verdict in its favor.

In *People of New York* v. *Zimmerman*, 278 U. S. 63, 73 L. ed. 184, 62 A. L. R. 785, the court said:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> "Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary

effect of the judgment has been to deny the claim, that is enough."

These cases and many others that could be cited clearly show that the validity of the statute was drawn in question by the exception to plaintiff's Instruction No. 1 and by the request for an instructed verdict. Appellee could not have recovered in the absence of the statute. His right to recover was challenged and the court, in instructing the jury that appellant was liable for the negligence of Myers and in refusing to instruct a verdict for appellant, upheld the validity of the statute. The identical question, as applied to railroad companies, was raised in the same manner in *Missouri Pac. Ry. Co.* v. *Mackey,* 127 U. S. 206, 32 L. ed. 107, and the court assumed jurisdiction.

Moreover, the state law of Arkansas does not require that questions of this character be raised in specific terms.

It was held in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Hesterly,* 98 Ark. 240, 135 S. W. 874, that the applicability of the Federal Employers' Liability Act was raised by a motion for an instruction in general terms that no damages for pain and suffering could be allowed. See also the same case, 228 U. S. 702, 57 L. ed. 1031.

It is the law of that state that a general objection to an inherently erroneous instruction as distinguished from one erroneous in form is sufficient to raise the question of whether or not it correctly states the law.

Missouri Pac. R. Co. v. *Warrick,* 164 Ark. 556, 262 S. W. 644;

Missouri Pac. R. Co. v. *Johnson,* 167 Ark. 464, 268 S. W. 31;

Arkebauer v. *Falcon Zinc Co.,* 178 Ark. 943, 12 S. W. (2d) 916.

But, as we have heretofore pointed out, in view of the fact that the State Supreme Court passed upon the constitutionality of the statute, it is not now material whether or not the constitutional question was raised prior to the time the motion for new trial was filed.

Appellee's Motion to Dismiss or Affirm.

The grounds of the motion to dismiss are *(1)* "want of jurisdiction"; *(2)* "because the record fails to show that appellant is within the class with respect to whom it is alleged the statute under examination is unconstitutional"; *(3)* "because the record does not properly present a substantial federal question"; *(4)* "because the appeal is informal, irregular, and insufficient for reasons stated in the annexed argument and statement denying jurisdiction, and upon other grounds."

The ground for the motion to affirm is "that it is manifest that the appeal herein was taken for delay only, and that the question upon which it is claimed that the jurisdiction depends are [is] so frivolous as not to need further argument."

We have heretofore filed a brief in opposition to the motion to dismiss or affirm. That brief, together with the argument which we shall make herein on the merits, is sufficient to dispose of grounds (1), (3) and (4) and they will not be reargued herein. But we desire to amplify somewhat the argument made in answer to appellee's contention that the record fails to show that appellant is within the class with respect to whom it is alleged the statute under examination is unconstitutional.

Counsel for appellee contend, without as much as inti-

mating that appellant *is* a railroad company or a company engaged in mining coal, that the record does not show whether appellant does or does not operate a railroad or a coal mine; that the statute is constitutional insofar as it affects railroad companies and companies engaged in the mining of coal; and that, inasmuch as there is no affirmative showing that appellant is not of that class, it is in no position to urge that the statute is invalid as to all corporations. Our answer to that contention is fourfold:

(1) Appellee's complaint alleges, and appellant's answer admits, that appellant is a foreign corporation engaged in the production and transportation of oil and gas and laying and operating pipe lines for the transportation of oil and gas in the State of Arkansas and that appellee was injured while in the employ of appellant in connection with the operations of its oil and gas wells and pipe lines. (R. 3, 4, 7) It was not contended at the trial by either party that appellant was a railroad company or engaged in the mining of coal.

In the absence of anything further, this was sufficient to affirmatively show (if it was necessary to so show) that appellant was neither a railroad company nor a company engaged in the mining of coal. There being no allegation of such, there was no occasion for appellant to deny or allege that it was not a railroad company or engaged in the mining of coal.

In *Sully, Trustee,* v. *American National Bank,* 178 U. S. 289, 44 L. ed. 1072, the court, in answering the contention that one of the appellants was not in a position to raise the constitutional question because it did not appear that he was a citizen of another state than Tennessee, said:

"The further objection made to Carhart is that it does not appear that he is a citizen of another state than Tennessee, and hence cannot avail himself of the fact of such citizenship in order to claim that his rights as such citizen have been infringed within the meaning of section 2 of article 4 of the Constitution, declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. We think the objection untenable.

"In his original bill to foreclose the mortgage securing the $85,000 of bonds held by him, he described himself as a resident of the State of New York; and in the petition of Mrs. Myton and Mr. Carhart, filed October 11, 1895, in the two cases of the bank against the land company, and Sully, trustee, against the land company, Mrs. Myton is described as a resident of the state of New York, and A. B. Carhart is described as a resident of the City of Brooklyn. *No question seems to have been made throughout the litigation as to the citizenship of those parties. The question does not seem to have arisen in any stage of the case up to the argument in this court.* Although there may be some slight difference in the facts between this case and those which are stated in *Blake* v. *McClung*, 172 U. S. at page 246, 43 L. ed. 434, 19 Sup. Ct. Rep. 165, *we yet think that Carhart brings himself within the principle decided in that case, and that his citizenship in the State of New York should be regarded as sufficiently proved.*"

Even though there had been a burden upon appellant to allege and prove that it was not a railroad company or engaged in the mining of coal, the above case is authority for the proposition that where the case was tried on the theory that appellant was engaged in the production and transportation of oil and gas and not in the railroad or coal business, it will be deemed that such negative facts are established.

Moreover, we think that the very allegation that appellant was engaged in a certain business is sufficient to imply that it was not engaged in another and entirely different kind of business. And, again, the very name "Petroleum Company" which appellant bears negatives the idea that it is a railroad company or a coal mining company.

(2) It is apparent from the record in this case that appellant is not a railroad company in the general sense in which that term is understood, for railroad companies are not ordinarily engaged in the production and marketing of petroleum and natural gas, as the record shows appellant to have been; and, if it was engaged in the mining of coal, it certainly was not engaged exclusively in that business. Therefore, if appellant could in any sense be considered a railroad company or a company engaged in the mining of coal, only part of its business could be so considered, and appellee was employed in another kind of business not related to or in furtherance of the railroad business or coal mining business. Consequently, even though it should be presumed that appellant operated a railroad at some point or operated a coal mine, the statute would be inapplicable to appellee and other employees engaged in the production and transportation of oil, not in furtherance of the railroad or coal mining businesses; and liability in this case could only be predicated upon the statute applicable to corporations in general. While it has been held by this court that it is permissible to classify all railroad company employees, whether engaged in the actual work of operating trains or not (*Louisville & Nashville R. Co.* v. *Melton,* 218 U. S. 36, 54 L. ed. 921; *Mondou* v. *N. Y., N. H. & Hartford R. Co.,* 223 U. S. 1, 56 L. ed. 327); nevertheless, it has never been held that all employees of a corporation, regardless of the particular

business in which they are engaged, may be classified for purposes of this kind because of the fact that the corporation at some point operates a line of railroad. This court held the Arkansas statute with respect to railroads was applicable to a company which operated a short line of railroad in connection with its mines, *where the injured employee was engaged in operating trains on that railroad. Aluminum Co. of N. A.* v. *Ramsey*, 222 U. S. 251, 56 L. ed. 185. Should a statute of this kind be construed to apply to the employees of such a company engaged in a business wholly unrelated to and not in furtherance of the railroad business or the coal mining business, the classification thus attempted would be arbitrary and void. *Schus* v. *Powers-Simpson Co.*, 85 Minn. 447, 89 N. W. 68, 69 L. R. A. 887, 889.

This identical question was decided by the Supreme Court of North Carolina in *Twiddy* v. *Dare Lumber Co.*, 154 N. C. 237, 70 S. E. 282. The statute of that state provided that any employee of any railroad company who should be injured during his employment by the negligence of any other employee of the company might maintain an action against such company. The court held that the statute was applicable to a lumber company which operated a railroad in connection with its lumber business, to the extent that its employees were engaged in the operation of the company's railroad or any department of it. The court then said:

> "But this position, though fully established and sustained by these and many other decisions that could be cited, does not extend the effect of the fellow servant statute to employees of lumber companies who are in no way connected with the operation of these railroads. The act, in terms, uses the words 'railroad companies' and no other, and may not be applied to

employees who are engaged in the lumbering features of the business. In the case before us, as we interpret the testimony, the plaintiff was properly in the lumbering department of the business. So far as the evidence now discloses, he was not a part of the train crew, nor was he directly engaged in operating either the skidder or the loader, and, while he was at the time at work on a loading yard, he was, as stated, engaged in the lumbering features of the work, and could in no proper sense be considered an employee of a railroad or any department of it.

"We are of opinion, therefore, that the act in question has no application, and there was error in allowing the jury to determine the question of defendant's responsibility as in any way affected by it."

To the same effect see *Gurganous* v. *Camp Mfg. Co.*, 204 N. C. 525, 168 S. E. 833.

(3) The burden was upon appellee to allege and prove that appellant was a railroad company or a company engaged in mining coal, in order to bring his case within those provisions of the statute, and having alleged and established only that appellant is a corporation, his case must stand or fall upon the validity or invalidity of the statute as applied to all corporations.

None of the cases cited by appellee discusses the burden of proof in a matter of this kind. Some of those cases support the rule as stated by Mr. Justice BRANDEIS in *Heald* v. *District of Columbia*, 259 U. S. 114, 66 L. ed. 852, that "one who would strike down a state statute as violative of the federal constitution must show that he is within the class of persons with respect to whom the act is constitutional, and that the alleged unconstitutional feature injures him." There was no question in that case or in the other

cases cited as to the burden of proof. The facts were disclosed by the record and upon the facts as they appeared from the record the complaining party was not injured by the alleged unconstitutional feature of the statute. For example, in the *Heald* case a resident of the District of Columbia filed suit as committee of Peters, an insane person, also a resident of the District of Columbia, to recover certain taxes levied by Congress upon intangible properties of persons resident or engaged in business within the District. The Act of Congress was attacked on the grounds that it was invalid as to non-residents of the District and levied a tax upon bonds of states and their municipalities. The court held that, since the plaintiff was a resident of the District and the property on which the tax was levied did not include any state or municipal bonds, he was in no position to raise the question.

The cases cited by appellee would be applicable here only if the record affirmatively showed that appellant was a railroad company or a company engaged in mining coal.

Had such facts appeared in the record, this court might do as it did in *Aluminum Company* v. *Ramsey, supra*, and decline to pass on the constitutionality of the statute as applied to corporations, because in such case the court could say that the constitutionality of the statute as to corporations in general could not be raised by appellant.

The question here presented is where lies the burden of proof. Was the burden upon appellee to allege and prove that appellant was a railroad company or engaged in the mining of coal, or was it incumbent upon appellant to allege and prove that it was not engaged in either of those businesses? The question does not seem difficult of solution un-

der well settled principles. Appellee having brought this suit, it was necessary for him to allege and prove all facts necessary to establish a cause of action. *Garrett* v. *Louisville & Nashville R. Co.*, 235 U. S. 308, 59 L. ed. 242. If, as we contend, the statute is unconstitutional as applied to corporations in general, to that extent it is void and the situation is precisely as if the statute, by its express terms, applied only to railroad companies and companies engaged in mining coal. *Chicago, Indianapolis & Louisville Ry. Co.* v. *Hackett*, 228 U. S. 559, 565, 57 L. ed. 966, 969. This court, in that case, said:

> "That Act was therefore as inoperative as if it had never been passed, for an unconstitutional Act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law."

If the statute had been limited to railroad companies and coal mining companies and the plaintiff had filed this suit, it would have been incumbent upon him to allege and prove that appellant came within one of those provisions.

—*Brinkmeier* v. *Missouri Pac. Ry. Co.*, 224 U. S. 268, 56 L. ed. 758;

United States v. *Perryman*, 100 U. S. 235, 25 L. ed. 645;

St. Louis, I. M. & S. Ry. Co. v. *Hesterly*, 98 Ark. 240, 135 S. W. 874;

Sandals v. *Mizpah Min. Co.*, 66 Okl. 233, 168 Pac. 808;

Zeller, McClellan & Co. v. *Vinardi*, 42 Ind. 232, 85 N. E. 378;

L. T. Dickason Coal Co. v. *Unverferth*, 30 Ind. App. 546, 66 N. E. 759;

5 Labatt on Master & Servant, p. 5812.

In *Brinkmeier* v. *Missouri Pac. Ry. Co., supra,* and in *St. Louis, I. M. & S. Ry. Co.* v. *Hesterly, supra,* it was held that, in an action under the Federal Employers' Liability Act, it was necessary for plaintiff to allege and prove facts sufficient to bring his case within the operation of the statute. In *L. T. Dickason Coal Co.* v. *Unverferth, supra, Zeller, McClellan & Co.* v. *Vinardi, supra,* and *Sandals* v. *Mizpah Min. Co., supra,* it was held that, in actions for injury or death under statutes applicable to coal mines where 10 men or more are employed, it is necessary to allege and prove that the coal mine in which the injured person was working was one in which 10 or more men were employed. The same rule is announced in 5 Labatt on Master & Servant, page 5812.

In *Garrett* v. *Louisville & Nashville R. Co., supra,* the Federal Supreme Court held, in an action by the parents for the death of their son under the Federal Employers' Liability Act, that the declaration was fatally defective where it contained no averment of pecuniary loss to the parents. The court said:

> "Where any fact is necessary to be proved in order to sustain the plaintiff's right of recovery, the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point, so that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters. * * *
>
> "The plaintiff's declaration contains no positive averment of pecuniary loss to the parents for whose benefit the suit was instituted. Nor does it set out facts or circumstances adequate to apprise the defendant with reasonable particularity that such loss in fact was suffered. Common experience teaches that financial dam-

age to a parent by no means follows as a necessary consequence upon the death of an adult son."

At common law the master was not liable for injuries to an employee caused by the negligence of a fellow-servant. *Northern Pac. R. Co.* v. *Peterson,* 162 U. S. 346, 40 L. ed. 994; *Graham* v. *Thrall,* 95 Ark. 560, 129 S. W. 532. And a complaint which shows that the negligence on which the cause of action is based was that of a fellow-servant is demurrable.

—*Ashley* v. *Hart,* 147 Mass. 573, 18 N. E. 416, 1 L. R. A. 355;

Central of Georgia v. *Lamb,* 124 Ala. 172, 26 So. 969;

39 C. J. 935, 940, and cases cited.

And *a fortiori* evidence which proves that the injury to the plaintiff was due to the negligence of a fellow-servant is demurrable.

The burden was therefore upon appellee to allege and prove that appellant was a railroad company or a coal mining company in order to have the advantage of those provisions of the statute. Having failed to allege or prove those facts, and they not otherwise appearing, and it appearing on the contrary that appellant was a corporation engaged in the oil business, the judgment in this case can be sustained only under that portion of the statute applicable to all corporations.

A very similar question was decided by this court in an opinion by Mr. Chief Justice TAFT, in *Samuels* v. *McCurdy, Sheriff,* 267 U. S. 188, 69 L. ed. 568. In that case Samuels brought suit against the sheriff to recover certain liquor and to enjoin the destruction thereof on the ground

that the statute of Georgia under which the liquor was seized was in violation of the Federal Constitution. A demurrer to the petition was sustained by the trial court and affirmed by the State Supreme Court. The statute authorized the destruction of the liquor upon order of the court. This court said:

> "The averment in the petition was that the sheriff intended to destroy the liquor. There is no averment in the petition that he did not intend to do this by order of court, upon his application. We must take it for granted on the demurrer, therefore, *as against the pleader,* that the sheriff did not intend to depart from Sec. 20 of the Act of 1915, *and that the question made here is on the validity of that section.*"

The court cannot say, as it did in some of the cases cited by appellee, that appellant is not within the class of persons with respect to whom the statute is unconstitutional. Appellant has shown that "it is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him." It has shown that the judgment in this case could only be sustained under the provision of the statute applicable to all corporations, and it has shown that the case was actually decided by the State Supreme Court upon that theory.

While we have discussed the burden of proof, we wish to state unequivocally that this is not a technical matter which counsel for appellee overlooked, but we wish to state distinctly that the appellant is not a railroad company, does not operate a railroad or a coal mine, either in Arkansas or in any other state. Moreover, counsel for appellee have not said and will not say the contrary.

(4) The Supreme Court of Arkansas having decided the case on the theory that only that portion of the statute applicable to all corporations was involved, and having upheld the same, the jurisdiction of this court cannot be avoided by showing that the case could have been decided upon other grounds. The contention now made by appellee was not so much as suggested to the Supreme Court of Arkansas. It was there contended that the constitutionality of the statute had not been raised in the proper time and manner and that the statute as applied to all corporations was valid, as had been many times held by the State Supreme Court. The contention of appellee is stated in the court's opinion, as follows:

> "The contention that said Act is unconstitutional is one of the grounds urged for a reversal of the judgment. *It is the contention of the appellee that this question was waived by the failure of the defendant in the court below to interpose this defense by demurrer, answer, or other appropriate plea.*"

We have shown, under the decisions of this court and under the practice of Arkansas, the Supreme Court of that state could not properly have refused to decide the validity of the statute as to all corporations. Had it done so, the nonfederal ground of the decision would have been unsubstantial and this court would have jurisdiction to review the judgment.

—*Broad River Power Co.* v. *South Carolina,* 281 U. S. 537, 74 L. ed. 1023;

Brinkerhoff-Faris Trust & Savings Co. v. *Hill,* 281 U. S. 673, 74 L. ed. 1107.

But, assuming that the State Supreme Court could have ruled on the record before it that it was not required to pass

upon the constitutionality of the statute as to all corporations, it did not do so, but held the statute valid as to all corporations. The fact that the court could have avoided passing upon the constitutional question does not deprive this court of jurisdiction to review the judgment.

—*Ohio, ex rel. Clarke,* v. *Deckebach,* 274 U. S. 392, 71 L. ed. 1115;

First National Bank v. *Anderson,* 269 U. S. 341, 70 L. ed. 295;

Chicago, Rock Island & Pac. R. Co. v. *Perry,* 259 U. S. 548, 66 L. ed. 1056;

Miedreich v. *Lauenstein,* 232 U. S. 236, 243, 58 L. ed. 584, 589.

In *Miedreich* v. *Lauenstein; supra,* this court said:

"Where a state court holds that a federal question is made before it, according to its practice, and proceeds to determine it, this court will regard the question as duly made."

In *Ohio, ex rel. Clarke,* v. *Deckebach, supra,* the plaintiff petitioned the Supreme Court of Ohio for a writ of mandamus commanding the defendant, the auditor of Cincinnati, to grant him a license to conduct a billiard and pool room in that city. The petition alleged that plaintiff was a subject of the King of England and that he had been refused a license solely because he was not a citizen. It drew in question the validity of the city ordinance as violating a treaty between Great Britain and the United States and as denying the equal protection of the laws guaranteed by the Fourteenth Amendment. Defendant answered, traversing the allegation of citizenship and asserting that the ordinance was a reasonable police regulation passed in the interest of the public. On plaintiff's motion, the Supreme Court of Ohio

gave judgment on the pleadings, dismissing the petition. In an earlier case, it had held that the ordinance in question did not deny any rights guaranteed by the Federal Constitution. On the record before the court, the allegation that plaintiff was a subject of the King of England was denied. This court, in disposing of the contention that the plaintiff had not established that he was entitled to the benefit of the treaty, said:

> "At the outset defendant insists that plaintiff has not established that he is entitled to the benefit of the treaty since his allegation of citizenship is not admitted on the face of the pleadings. But the Supreme Court of Ohio has construed the pleadings as sufficient to draw in question the validity of the ordinance under the treaty. Hence we need not concern ourselves with those refinements of the local law of pleading which, it is said, enable defendant to justify his refusal to issue a license because of plaintiff's assertion of British citizenship, and at the same time deny that plaintiff has established citizenship entitling him to the protection of the treaty."

In *First National Bank* v. *Anderson, supra,* it was urged by motion to dismiss that this court was without jurisdiction because, although the state court decided the federal question, the judgment could be sustained on another ground, namely, that the suit was not one in which relief might be had in equity, there being an adequate remedy at law, etc. This court, in disposing of that contention, said:

> "The second ground is not better. The Supreme Court of the state treated the case as cognizable in equity and perceived no obstacle to a consideration of the merits as displayed in the petition. In this that court was proceeding within limits where the state laws and practice were controlling, and its action is not open to revision here."

The case of *Chicago, Rock Island & Pac. R. Co.* v. *Perry, supra,* is even more conclusive. That case involved the validity of the "Oklahoma Service Letter Act." The Supreme Court of Oklahoma passed upon the constitutionality of the act and held it valid. In disposing of a motion to dismiss the writ of error, this court said:

> "Defendant in error moves to dismiss the writ of error on the ground that the constitutionality of the act was not really at issue; that the trial judge's instructions to the jury show that the only substantial question was whether the statements made in the letter actually given by the defendant were false and derogatory, and whether plaintiff had suffered damage thereby. But since the court of last resort of the state actually dealt with and passed upon the question raised by plaintiff in error as to the validity of the statute upon the ground of its being repugnant to the Constitution of the United States, and decided in favor of its validity, it is clear that, under the first paragraph of Sec. 237, Judicial Code, as amended by Act of September 6, 1916, Chap. 448, 39 Stat. at L. 726, Comp. Stat., Sec. 1214, Fed. Stat. Anno. Supp. 1918, p. 412, we have jurisdiction to pass upon the question, and the motion to dismiss must be denied. * * *
>
> "Again, in discussing the merits, defendant in error insists that the federal question is not necessarily involved; that the constitutional objection was waived when the company, instead of refusing to give a letter, of its own volition gave to Perry, upon his dismissal, a service letter which was false and derogatory, and which caused special damage that was pleaded and proved. At first blush, it seems somewhat strange for the company to aver that it acted under compulsion of a void statute, when what it did was contrary to the command of the statute; it almost looks as if it were merely held in damages for what ordinarily might be called a libel. *But the case cannot properly be dealt with upon*

this ground. The Supreme Court of Oklahoma not only passed upon the question of the constitutionality of the Service Letter Law, but deemed it necessary to pass upon it. So far as can be gathered from its opinion, there was no other legal ground upon which the judgment could be supported. Apparently, under the law of Oklahoma, apart from the statute, no legal duty was imposed upon the employer in such a case to speak the truth in a communication made respecting a discharged employee, nor was there other ground of liability for damages in case of its falsity. The statute is the essential foundation upon which the judgment rests, and we cannot find that the objections to its validity have been waived."

The Supreme Court of Arkansas having deemed it necessary to pass upon the constitutionality of the statute as applied to corporations, and having done so, the case is properly here.

PART II.

THE MERITS.

Statement of the Case.

This action was commenced by R. O. Jenkins as plaintiff, herein referred to as appellee, against Phillips Petroleum Company and Joe H. Myers in the Ouachita Circuit Court, Second Division, State of Arkansas, on June 16, 1934. The complaint alleged that Phillips Petroleum Company is a foreign corporation authorized to do business in the State of Arkansas and is engaged in the business of operating oil and gas wells, producing oil and gas, and laying and operating pipe lines for the transportation of oil and gas in the State of Arkansas; that on April 5, 1934, the appellee was in the employ of Phillips Petroleum Company in

connection with the operation of its oil and gas wells and pipe lines in the capacity of a laborer; that Joe H. Myers was also an employee of Phillips Petroleum Company and a fellow-servant of appellee; that on April 5th 1934, appellee, with other employees of appellant, was engaged under the direction of the foreman, Jim Forsyth, in stringing a 2½ inch gas line on appellant's Fleming Lease in Union County, Arkansas; that appellee and Joe H. Myers were engaged in carrying a joint of pipe to the place where other employees were stringing the pipe; that appellee was carrying one end of said pipe on his shoulder and Joe H. Myers was carrying the other end on his shoulder, appellee carrying the front end, with his back to Myers; that Myers carelessly and negligently, and without warning to appellee, shifted the joint of pipe from one shoulder to the other and thereby carelessly and negligently jerked on said joint of pipe, causing the appellee to lose his balance and step in a hole in the ground and fall, by reason of which he sustained injuries; that the injuries to appellee were caused solely on account of the negligence and carelessness of Joe H. Myers, and, at the time such acts of negligence were committed by Myers, he was a fellow-servant of the appellee. Appellee prayed damages in the sum of $75,000.00. (R. 3-7)

The answer of Phillips Petroleum Company admitted that it is a corporation, incorporated under the laws of Delaware and authorized to do business in Arkansas and is engaged in the production and transportation of oil in Union and Ouachita Counties, Arkansas. It admitted that appellee was in its employ and admitted that on the date in question he and Joe H. Myers were carrying a joint of pipe, the appellee carrying the front end, with his back to Myers, but

denied that Myers shifted the pipe from one shoulder to the other and denied that Myers jerked the same or in any manner caused appellee to step in a hole and fall. It denied that appellee sustained any injuries on account of any negligence of Myers, but alleged that, if appellee was injured, it was because of his own carelessness and negligence. (R. 7-10)

The evidence of appellee tended to substantiate the allegations of his complaint. (R. 17-44)

There was no controversy as to the facts material to this appeal. It was alleged by appellee and admitted by appellant that appellee and Joe H. Myers were fellow-servants, and the evidence established that fact beyond question. Both men were engaged in the same line of work, under the same foreman, and it was sought to hold appellant liable under the provisions of section 7137, Crawford & Moses Digest of the Statutes of Arkansas, although no reference to the statute was made in the pleadings.

The case was tried to a jury, and a verdict was returned in favor of appellee against appellant and Joe H. Myers for the sum of $50,000, upon which judgment was duly entered. (R. 10)

At the conclusion of all the evidence, appellant requested the court to direct a verdict in its favor, which was refused and to which appellant excepted. (R. 79) The court gave to the jury plaintiff's Instruction No. 1 (R. 81), which is quoted in Assignment of Error No. 2 hereinafter set forth. It told the jury, in substance, that appellant was liable for the negligence of Myers.

A motion for new trial was filed and overruled, and an appeal taken to the Supreme Court of Arkansas, where

that court modified and affirmed the judgment by reducing the amount to $30,000. (R. 87)

We have shown under Part I hereof that the question of constitutionality of Section 7137, Crawford & Moses Digest of the Statutes of Arkansas, was drawn in question, and the statute was upheld by the State Supreme Court and that the cause comes to this court by appeal pursuant to the provisions of section 237 (a) of the Judicial Code (Title 28, U. S. C. A., Sec. 344 (a)).

There is considerable doubt as to whether there was any negligence of Myers and whether appellee was injured, but those questions have been foreclosed by the decision of the State Supreme Court, and the sole question presented in this appeal is whether the statute above mentioned is repugnant to the Fourteenth Amendment to the Constitution of the United States.

Specification of Assigned Errors to Be Urged.

1. The Supreme Court of Arkansas erred in holding that appellant's request for a peremptory instruction was properly refused by the trial court. The liability of appellant was based solely upon the alleged negligence of a co-employee and fellow-servant of appellee. Appellant was not and is not a railroad company nor engaged in the mining of coal, and would not have been liable under the laws of Arkansas but for that portion of section 7137, Crawford & Moses Digest of the Statutes of Arkansas which provides that "all corporations of whatsoever kind and character" shall be liable in damages for injuries to an employee caused by the negligence of any other agent, servant or employee.

Said portion of the statute is unconstitutional and void for the following reasons:

(a) It deprives appellant of the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it unreasonably and arbitrarily discriminates against corporations by creating a liability of corporations to their employees for injuries sustained as the result of negligence of a fellow-servant, leaving individual and partnership employers engaged in the same business free of liability to their employees for injuries sustained under the same circumstances. The Supreme Court of Arkansas erred in refusing to so hold;

(b) It deprives appellant of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it unreasonably and arbitrarily makes the fact of incorporation the basis of liability of employers for injuries to their employees resulting from negligence of co-employees and fellow-servants. The Supreme Court of Arkansas erred in refusing to so hold.

2. The Supreme Court of Arkansas erred in holding that the trial court properly gave to the jury Instruction No. 1, as follows:

"You are instructed that if you find from a preponderance of the evidence that plaintiff and defendant, Joe H. Myers, in the performance of their duties as employees of the defendant, Phillips Petroleum Company were carrying a joint of pipe as alleged in the complaint, the front end of said pipe resting on plaintiff's shoulder and the rear end of said pipe resting on the shoulder of the defendant, Joe H. Myers, and you further find from a preponderance of the evidence that the

defendant, Joe H. Myers, without warning, shifted said pipe from one shoulder to the other and jerked said pipe, and you further find that said shifting and jerking of said pipe without warning, constituted negligence, and you further find from a preponderance of the evidence that as the direct result of such negligence on the part of Joe H. Myers in so shifting and jerking said pipe without warning, plaintiff lost his balance and fell and was injured; and you further find that plaintiff was at the time in the exercise of ordinary care for his own safety, and had not assumed the risk, then you will find for the plaintiff and against both of the defendants."

Said instruction, insofar as it authorizes a verdict against appellant, was erroneous in that it made appellant liable in damages for an injury to the appellee as the result of negligence of a co-employee and fellow-servant and was based upon section 7137, Crawford & Moses' Digest of the Statutes of Arkansas. Appellant was not and is not a railroad company nor engaged in the mining of coal and is not liable under the laws of Arkansas for injuries sustained by an employee as the result of negligence of a co-employee or fellow-servant, except for that portion of section 7137, Crawford & Moses' Digest of the Statutes of Arkansas, which provides that "all corporations of whatsoever kind or character" shall be liable in damages for injuries to an employee caused by the negligence of any other agent, servant, or employee. Said portion of the statute is unconstitutional and void for the following reasons:

(a) It deprives appellant of the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it unreasonably and arbitrarily discriminates against corporations by creating a liability of corporations to their employees for injuries sustained as the result of negligence

of a fellow-servant, leaving individual and partnership employers engaged in the same business free of liability to their employees for injuries sustained under the same circumstances. The Supreme Court of Arkansas erred in refusing to so hold;

(b) It deprives appellant of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it unreasonably and arbitrarily makes the fact of incorporation the basis of liability of employers for injuries to their employees resulting from negligence of co-employees and fellow-servants. The Supreme Court of Arkansas erred in refusing to so hold.

ARGUMENT.

Both assignments of error raise the same question of law and will be grouped for argument under the following proposition:

Section 7137, Crawford & Moses Digest of the Statutes of Arkansas, in so far as it provides that "all corporations of whatsoever kind or character" shall be liable in damages for injuries to an employee caused by the negligence of any other agent, servant, or employee, denies to corporations the equal protection of the law and deprives them of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The statute has been quoted *ante,* page 3. It makes all railroad companies and all companies whether incorporated or not engaged in the mining of coal and all corporations of whatsoever kind or character liable in damages for injuries or death sustained by any employee from the negligence

of any other agent, servant, or employee of said employer to the same extent as if the negligence was that of the employer. The effect is to abolish the common law fellow-servant rule as to those employers.

The above statute has been construed to apply to all corporations. *Soard* v. *Western Anthracite Coal & Mining Co.*, 92 Ark. 502, 123 S. W. 759. And not to apply to partnerships. *Graham* v. *Thrall*, 95 Ark. 560, 129 S. W. 532.

At common law the master was not liable for injuries to his servant caused by the negligence of a fellow-servant. *Northern Pac. R. Co.* v. *Peterson*, 162 U. S. 346, 40 L. ed. 994; *Graham* v. *Thrall*, 95 Ark. 560, 129 S. W. 532; 39 C. J. 537, and cases there cited. So, unless the rule has been changed by a valid statute, that is the law of Arkansas, in which case the court erred in giving appellee's Instruction No. 1 and in refusing appellant's request for an instructed verdict in its favor.

The validity of the statute is squarely presented in this case. Appellee's entire case, both under his complaint and under his evidence, is based upon the alleged negligence of Myers who is characterized by appellee both in his complaint and in his evidence as his fellow-servant. (R. 4, 24)

It is the contention of appellant that this statute deprives it of the equal protection of the law and of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it makes corporations liable for injuries without making individual and partnership employers engaged in the same business liable for injuries to their employees under the same circumstances. Liability is made to depend upon the *character* of the employer, an arbitrary classification not based upon a real and substantial difference having a reasonable relation

to the subject of the particular legislation. Let us illustrate the practical effect of the statute:

(1) A. and his wife are engaged in the retail clothing business as co-partners. A clerk in their store suffers a broken arm as the result of negligence of a co-employee and fellow-servant who overturns a ladder on which the clerk is standing. Under the law of Arkansas, A. and his wife are not liable for damages to the injured clerk. A few months later A. and his wife incorporate and continue to operate the same business as a corporation. The same employee is again injured in the same manner. The corporation, under the statute, can be made to respond in damages. The same business, operated by the same people, under the same circumstances, is liable in one case and not in another solely because of the fact that it was unincorporated when the first injury occurred and was incorporated when the second injury was sustained.

(2) A., a corporation, is engaged in drilling a well; a few hundred feet away B., an individual, is drilling a well. An employee of each is injured by the negligence of a fellow-servant. A. must compensate his employee but B. is not liable to his employee.

(3) A group of local men desire to prospect for oil and gas in the vicinity. Not wishing to risk their entire fortunes, and each wishing to contribute a certain amount to the venture, they incorporate a small company for the purpose of drilling a test well. A group of capitalists decide to drill a well in the same vicinity but do not incorporate. The two wells are located a few hundred feet from each other. They are drilled simultaneously; the same number of men work on each well; an employee at each well is injured by the negligence of a fellow-servant. The local company must

compensate its employee while the capitalists are not liable to their employee.

(4) A man and his family incorporate a small company and engage in a comparatively safe business, such as the merchandising of shoes. A group of wealthy men form a partnership and engage in the manufacture of nitroglycerin, where the hazard of injury to employees is great. An employee of each is injured by the negligence of a fellow-servant. The family corporation engaged in the comparatively safe business must compensate its employee while the wealthy partnership engaged in the extremely hazardous business is free of liability.

Examples could be multiplied indefinitely. But the above are sufficient to demonstrate the working of the statute and to prove the absurd and arbitrary character of the classification.

Such an unreasonable and arbitrary classification is prohibited by the Fourteenth Amendment to the Constitution of the United States. That amendment provides, in part:

> "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Corporations are persons within the meaning of the above provisions.

—*Lake Shore, etc., R. Co.* v. *Smith,* 173 U. S. 690, 43 L. ed. 858;

Missouri Pac. R. Co. v. *Mackey,* 127 U. S. 209, 32 L. ed. 107;

Quaker City Cab Co. v. *Pennsylvania,* 277 U. S. 389, 72 L. ed. 927;

Frost v. *Corporation Commission of Oklahoma,* 278 U. S. 516, 73 L. ed. 483.

We concede the right of the legislature to make reasonable classifications. We concede that the statute, insofar as it classifies all railroads and all coal mines, is a valid exercise of the police powers of the state. But, we contend that the statute, insofar as it places all corporations in a class regardless of the business in which they are engaged, is unreasonable and arbitrary. This court has repeatedly upheld the validity of statutes applicable only to railroads on the theory that the dangerous character and the public nature of the busines warrant separate treatment. In fact, this court has upheld the statute in question insofar as railroad companies are concerned. *Aluminum Co. of N. A.* v. *Ramsey,* 222 U. S. 251, 56 L. ed. 185. The Supreme Court of Arkansas had upheld the statute and applied it in that case, not because appellant was a railroad company, but because it was a corporation. This court, however, refused to uphold the statute on that ground, but held that the statute was specifically applicable to railroad companies and that appellant was a railroad company and the statute was valid as to it, and that it was in no position to question the validity of the statute as to other corporations.

The Supreme Court of Arkansas first upheld the statute in the case of *Ozan Lumber Co.* v. *Biddie,* 87 Ark. 587, 113 S. W. 796, and later in a number of other cases. But the *Ozan Lumber Company* case is the only one in which the court ever attempted to give any reason for its holding, other cases merely being decided on the authority of that one. In that case, the Ozan Lumber Company was a domestic corporation and the theory of the decision was that the state had reserved the right to amend the charters of corporations and that the statute amounted to such an amendment. The court conceded that, even in the case of domestic corpora-

tions, charters could be amended only upon terms that are just and reasonable. The reasoning of the court in holding the statute valid as to all corporations was as follows:

> "*Acts of Legislatures imposing such liability on railroad companies have been upheld by the courts on account of the hazardous character of the business of operating a railway. The only difference of the reason for such acts and the act in question is the danger of the service of railroads is greater than that of other corporations—a difference in degree, and not in kind.* We think the act in question is constitutional as to corporations."

It is apparent that the court's reasoning entirely missed the point. Its reasoning would, perhaps, be sufficient to uphold an act applying to all employers, but it fails utterly to justify an act applying to corporate employers only. Granting that the difference in the danger of any employment is only a matter of degree, the mere character of the employer as being incorporated or not has no bearing whatever on the situation. It was not the incorporation of railroads that justified their classification; it was the nature of the business conducted. The question for the court to determine is not whether the difference in the danger of the service of railroads and other corporations is one of degree, but whether there is any sound basis for making a distinction between corporations and individuals and partnerships engaged in the same business.

In *Aluminum Company of North America* v. *Ramsey, supra*, this court questioned the application of the holding of the Arkansas Supreme Court in the *Ozan Lumber Company* case to foreign corporations, in the following language:

"In *Ozan Lumber Co.* v. *Biddie, supra,* the court decided that 'the fellow-servant law' was an amendment to the charters of corporations, made under the right reserved in the Constitution of the state to repeal, alter, or amend such charters. *The Ozan Lumber Company, however, was a domestic corporation, and whether the principle of the decision would be applicable to foreign corporations, as plaintiff in error in the case at bar is, being a Pennsylvania corporation, depends on many considerations, and involves questions not local;* so we pass to the consideration of the merits."

In declining to pass on the validity of the statute as applied to all corporations, the court said:

"On the merits the case is in a very narrow compass and does not demand much discussion though plaintiff in error earnestly presses the contention that the statute is discriminatory in that it applies to all corporations, but does not apply to individuals or partnerships. *Whether that exact distinction, that is, the distinction merely between corporations and partnerships and individuals, is competent for a legislature to make, under its power of classifying objects, we are not called upon to decide.* The distinction made by the statute is broader. *The distinction* (among others) *it makes is between railroads operating in the state and individuals, and such distinction has been maintained by this court as not offendiny the Constitution of the United States.* (Citing authorities.)

"What grievance plaintiff in error might have if it were not operating a railroad, we are not called upon to consider, because it is limited in its complaint to the effect of the statute on it, and cannot appropriate the grievance that corporations engaged in mining, but not operating railroads; may have on account of the distinction made between them and individuals.

"It is true that the Supreme Court of the state, following Ozan Lumber Co. v. *Biddie, supra, decided*

the law was a regulation of corporations, and applied it to the plaintiff in error because it was a corporation, not distinguishing it as one operating a railroad. It, however, may be so distinguished under the statute. That is, the statute constitutes a class of corporations operating railroads, and under the cases we have cited the classification is valid, there being equality within the class. In other words, not only the plaintiff in error, but all other corporations operating railroads, are covered by the statute."

Statutes similar to the one in question have been condemned as violating the Fourteenth Amendment to the Constitution of the United States by the Supreme Court of Mississippi, the Supreme Court of Indiana, and the United States Circuit Court of Appeals for the Eighth Circuit.

—*Ballard* v. *Mississippi Cotton Oil Co.*, 81 Miss. 507, 34 So. 533, 62 L. R. A. 407, 95 A. S. R. 476;

Bedford Quarries Co. v. *Bough*, 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (n.s.) 418);

Chicago, M. & St. P. R. Co. v. *Westby*, 102 C. C. A. 65, 178 Fed. 619.

The statutes condemned by the Mississippi and Indiana courts cannot be distinguished from the Arkansas statute. They purported to abrogate the common law fellow-servant rule as to all corporations. The statute condemned by the Circuit Court of Appeals purported to abrogate the common law fellow-servant rule as to all common carriers, a classification having a great deal more basis than that of all corporations. That court expressly approved the holding in the Mississippi case, referring to it in this language:

"Perhaps the most learned and exhaustive opinion upon *this question* is that of Chief Justice WHITFIELD in *Ballard* v. *Mississippi Cotton Oil Co.*, 81 Miss.

507, 34 South. 533, 62 L. R. A. 407, 95 Am. St. Rep. 476. Support for the conclusion which has been reached may be found in that opinion and in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 155, 165, 17 Sup. Ct. 255, 41 L. ed. 666; * * * (citing other cases)."

The *Ballard* case was followed by the Mississippi court in *Bradford Construction Co.* v. *Heflin*, 88 Miss. 314, 42 So. 174, 12 L. R. A. (n.s) 1040, 8 A. C. 1077, where the court said:

> "And, so far as the contention that the *Ballard* case is unsound, is concerned, it is sufficient to remark, *first*, that that case was considered for two years by this court; *second*, that it was argued four times orally; *third*, that it received the concurrence of five of the judges of this court; *fourth*, that every argument that has been advanced now to show that the mere fact of incorporation was a defense was earnestly pressed in the argument of the *Ballard* case; *fifth*, that that case has stood as the law of the land for some years without question. It is simply waste of time to ask this court to overrule a case so thoroughly and patiently considered, and which has been so long established as the law of the land."

We shall refer to these cases at a later point in this brief.

There are no other cases that we know of involving the identical question before the court. There are, however, a number of decisions of this court, many of which are cited in the foregoing cases, which support our contention.

In *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 112, 46 L. ed. 92, 109, this court, in condemning a statute of Kansas, limiting the charges of a stock yards company having average daily receipts of a certain number of cattle, hogs and sheep, said:

"But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, *and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other.* * * *

"This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would. We think, therefore, that the principle of the decision of the Supreme Court of Kansas in *State* v. *Haun*, 61 Kan. 146, 47 L. R. A. 369, 59 Pac. 340, is not only sound, but is controlling in this case, and that the statute must be held unconstitutional as in conflict with the equal protection clause of the 14th Amendment."

That decision would seem necessarily to condemn the statute in question. The statute places greater burdens upon corporate citizens than are placed upon individuals and partnerships engaged in the same business. We shall presently see that the fact of incorporation does not justify a classification of this kind.

In *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, a state statute imposing an attorney's fee upon railroad corporations omitting to pay certain claims within a certain time after presentation, which applied to no

other corporations or individuals, was held to deny to railroads the equal protection of the law. The court, no doubt, will want to read the entire opinion. It illustrates the principle that classification must have a reasonable relation to the subject of the particular legislation. It does not follow from the fact that railroads may be classified for purposes of abrogating the fellow-servant rule as to its employees that they may be classified for all purposes. And from the fact that corporations may be classified for some purposes, notably taxation, it does not follow that they may be classified for the purposes of making them liable for injuries to their employees.

In *Kentucky Finance Co.* v. *Paramount Auto Exchange*, 262 U. S. 544, 67 L. ed. 1112, it was held that a state statute requiring a foreign corporation filing suit in the state to appear in the state with its records and submit to examination, was invalid, there being no such requirement as to individual non-residents or as to residents. The court said:

> "No doubt a corporation of one state, seeking relief in the courts of another, must conform to the prevailing modes of proceeding in those courts, and submit to reasonable rules respecting the payment of costs or giving security therefor and the like (see *Canadian Northern R. Co.* v. *Eggen*, 252 U. S. 553, 561, 64 L. ed. 713, 716, 40 Sup. Ct. Rep. 402); but it cannot be subjected, merely because it is such a corporation, to onerous requirements having no reasonable support in that fact, and not laid on other suitors in like situations. Here the statute authorized the imposition, and there was imposed on the plaintiff a highly burdensome requirement because of its corporate origin—a requirement which, under the statute, could not be laid on an individual suitor in the same situation. The discrimination was essentially arbitrary. There could be no reason for requiring a corporate resident of Louisville to send its

secretary, papers, files, and books to Milwaukee for the purposes of an adversary examination that would not apply equally to an individual resident of Louisville in a like case. The discrimination is further illustrated by the provision that, as to all residents of Wisconsin, individual and corporate, the examination should be had in the county of their residence, no matter what its distance from the place of suit.

"We hold that the statute, as it was applied in this case, was invalid, and the orders made under it were erroneous, as denying to the plaintiff the equal protection of the laws. This conclusion renders it unnecessary to consider the contention made under the due process clause."

In *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490, 71 L. ed. 1165, the Supreme Court held invalid a statute of Arkansas permitting a foreign corporation which had qualified to do business in the state to be sued in any county of the state, while suits against domestic corporations and individuals could be brought only in counties where they were found, or did business, or had a representative. The court said:

"We think it very plain that the statutes discriminate against foreign corporations and in favor of domestic corporations *and individuals*, and that the discrimination is not theoretical merely, but real and substantial.

"The clause in the 14th Amendment forbidding a state to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws (*Truax* v. *Corrigan*, 257 U. S. 312, 333, 66 L. ed. 254, 263, 27 A. L. R. 375, 42 Sup. Ct. Rep. 124; *Atchison, T. & S. F. R. Co.* v. *Vosburg*, 238 U. S. 56, 59, 59 L. ed. 1199, 1200, L. R. A. 1915-E, 953, 35 Sup. Ct. Rep. 675), and extends as well to corporate as to natural persons. (Citing authorities.) It does not prevent a state from adjusting its legislation to differences in

situation or forbid classification in that connection; but it does require that the classification be not arbitrary, but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation. (Citing authorities.)

"No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, *the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made.*

"Here the separate classification of foreign corporations is in respect of the venue or place of bringing transitory actions. The statutes mean foreign corporations doing business within the state by her permission, and therefore having a fixed place of business therein and a resident agent on whom process may be served. We speak only of them. So far as their situation has any pertinence to the venue of transitory actions it is not distinguishable from that of domestic corporations and individuals. Certainly there is no substantial difference. The opinion of the state court does not point to any relevant distinction, nor have counsel suggested any. Of course, the restricted venue as to domestic corporations and individuals is prompted by considerations of convenience and economy; but these considerations have equal application to foreign corporations. So far as the plaintiffs in such actions are affected, it is apparent that there is no more reason for a state-wide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person. So we conclude that the special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary."

Most conclusive is the case of *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 72 L. ed. 927. There a gross receipts tax was levied upon all *corporations* operating taxicabs. In holding the statute invalid, and after reviewing the authorities, the court said:

> *"Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. It is not peculiarly applicable to corporations as are taxes on their capital stock or franchises.* It is not taken in lieu of any other tax or used as a measure of one intended to fall elsewhere. It is laid upon and is to be considered and tested as a tax on gross receipts; it is specifically that and nothing else.
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> *"In effect Sec. 23 divides those operating taxicabs into two classes. The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed.* It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation. *Power Mfg. Co.* v. *Saunders, supra.* No decision of this court gives support to such a classification. In no view can it be held to have more than an arbitrary basis. As construed and applied by the state court in this case, the section violates the equal protection clause of the 14th Amendment. See, *Railroad Tax Case,* 8 Sawy. 238, 13 Fed. 722; *Santa Clara County* v. *Southern P. R. Co.,* 9 Sawy. 165, 18 Fed. 385; *Northern P. R. Co.* v. *Walker,* (C. C.) 47 Fed. 681. The tax cannot be sustained."

In *Frost* v. *Corporation Commission of Oklahoma*, 278 U. S. 516, 73 L. ed. 483, the court held that a statute which made cotton gins public utilities and required a showing of public necessity for a license to operate, but which permitted certain co-operative corporations to obtain a license without a showing of public necessity, deprived an individual, who had made a showing of public necessity, and obtained a license, of the equal protection of the law. The court said:

> "Is, then, the effect of the proviso to deny appellant the equal protection of the laws within the meaning of the 14th Amendment? As the proviso was construed and applied by the commission and by the court below, its effect is to relieve all corporations organized under the Act of 1919 from an onerous restriction upon the right to engage in a public business which is imposed by the statute upon appellant and other individuals, as well as corporations organized under general law, engaging in such business. That a greater burden thereby is laid upon the latter than upon the former is clear. Immunity to one from a burden imposed upon another is a form of classification and necessarily results in inequality; but not necessarily that inequality forbidden by the Constitution. The inequality thus prohibited is only such as is actually and palpably unreasonable and arbitrary. *Arkansas Natural Gas Co.* v. *Arkansas R. Commission*, 261 U. S. 379, 384, 67 L. ed. 705, 710, 43 Sup. Ct. Rep. 387, and cases cited.
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> "*The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances. Louisville Gas & E. Co.* v. *Coleman*, 277 U. S. 32, 37, 72 L. ed. 770, 773, 48 Sup. Ct. Rep. 423. This court has several times decided that a corporation is as much entitled to the equal protection of the laws as an individual. *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, 400, 72 L. ed. 927, 929, 48 Sup. Ct. Rep. 553; *Kentucky Finance*

Corp. v. *Paramount Auto Exch. Corp.*, 262 U. S. 544, 550, 67 L. ed. 1112, 1115, 43 Sup. Ct. Rep. 636; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255. The converse, of course, is equally true. A classification which is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual. In either case, the classification, in order to be valid, ' "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415, 64 L. ed. 989, 990, 40 Sup. Ct. Rep. 560; *Air-way Electric Appliance Corp.* v. *Day*, 266 U. S. 71, 85, 69 L. ed. 169, 177, 45 Sup. Ct. Rep. 12; *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240, 70 L. ed. 557, 564, 43 A. L. R. 1224, 46 Sup. Ct. Rep. 260. That is to say, MERE difference is not enough; the attempted classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255.' *Louisville Gas & E. Co.* v. *Coleman, supra*, p. 37 (72 L. ed. 773, 48 Sup. Ct. Rep. 423). * * *

"Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here construed and applied, badly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general public and to the same end, namely, that of reaping profits. That is to say, it produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation. Power Mfg. Co. v. *Saunders*, 274 U. S.

490, 493, 71 L. ed. 1165, 1167, 47 Sup. Ct. Rep. 678; *Louisville Gas & E. Co.* v. *Coleman,* 277 U. S. 39, 72 L. ed. 774, 48 Sup. Ct. Rep. 423; *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 402, 72 L. ed. 930, 48 Sup. Ct. Rep. 553."

As before pointed out, the theory of the Supreme Court of Arkansas in upholding the statute has always been that the reserved power to amend charters of corporations authorized the legislation in question. The court does not attempt to justify the legislation by the police power of the state. In fact, the court, in an earlier case, held that a statute regulating the time of payment of wages of employees was invalid as to individuals but valid as to corporations because of the reserved power to amend their charters. *Leep* v. *St. Louis, I. M. & S. Ry. Co.* 58 Ark. 407, 23 L. R. A. 264. In that case the court questioned whether the Fourteenth Amendment to the Federal Constitution was applicable to legislation amending charters of corporations. Perhaps that is the reason the State Supreme Court has never seen fit to discuss the reasonableness of the classification made by the statute. It is apparent that that court has labored under the impression that the powers of the state were considerably greater under its reserved power to amend charters of corporations than under the police powers of the state. In that we think the court was mistaken. As before pointed out, this court questioned whether the reserved power in a state to amend corporate charters was applicable to a foreign corporation. *Aluminum Company of North America* v. *Ramsey, supra.* Other courts have held that it was not. *Bedford Quarries Co.* v. *Bough,* 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (n.s.) 418, and cases cited. However, it seems clear that, whether applicable here or not, there is no greater power in the right reserved to amend corporate charters than in the

police powers. Under either theory the state may make such classification as is based upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which such classification is imposed, but arbitrary selection cannot be justified by calling it classification. *Southern R. Co.* v. *Greene,* 216 U. S. 400, 54 L. ed. 536; *Cotting* v. *Kansas City Stock Yards Co.,* 183 U. S. 79, 46 L. ed. 92, 108; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 46 L. ed. 679, 690; *Lake Shore & Mich. So. Ry. Co.* v. *Smith,* 173 U. S. 684, 43 L. ed. 858, 864; *Stearns* v. *Minnesota,* 179 U. S. 223, 45 L. ed. 162; *Chicago, M. & St. P. Ry. Co.* v. *Wisconsin,* 238 U. S. 491, 59 L. ed. 1423, L. R. A. 1916A, 1133. In the last three cited cases it was urged that the statute could be justified under the reserved power of the state to amend corporate charters. In the *Lake Shore* case a state statute fixing rates of railroads provided that thousand-mile tickets should be sold at reduced rates. The court held the statute invalid. With respect to the power to amend corporate charters, the court said:

> "The power to enact legislation of this character cannot be founded upon the mere fact that the thing affected is a corporation, even when the legislature has power to alter, amend, or repeal the charter thereof. The power to alter or amend does not extent to the taking of the property of the corporation either by confiscation or indirectly by other means."

The *Stearns* case involved the right of the state to abrogate a contract with the railroad for 3 per cent of the gross earnings in lieu of all other taxes. Speaking of the reserved power of the state to alter corporate charters, the court said:

> "But whilst this is settled, it has also been equally

determined that the reserved right to repeal, alter, or amend does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by depriving of the equal protection of the laws or of the constitutional guaranty against the taking of property without due process of law."

In the *Chicago, M. & St. P. R. Co.* case the court considered a statute prohibiting the letting down of an unengaged and unoccupied upper berth in a sleeping car when the lower berth in the same section was occupied. The court held the act arbitrary and void and that the reserved right of a state to amend corporate charters cannot be exercised so as to take property of a corporation without due process of law.

Thus it is seen that there is no magic in the reserved power to amend corporate charters, and that the state has no greater power under its reserved power to amend corporate charters than it has under its police powers. The validity of the statute turns upon whether it is reasonable or arbitrary in its classification.

Adverting now to the case of *Ballard* v. *Mississippi Cotton Oil Co.*, 81 Miss. 507, 34 So. 533, 62 L. R. A. 407, 95 A. S. R. 476 (1903), where the identical question before this court was carefully and exhaustively considered, the authorities reviewed at length, and the conclusion reached that the statute was unconstitutional.

The Mississippi statute provides:

"Every employee of any corporation shall have the same rights and remedies for an injury suffered by him from the act or omission of the corporation or its employees, as are allowed by law to other persons not employees, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party in-

jured; and also when the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work. Knowledge by an employe injured of the defective or unsafe character or condition of any machinery, ways, or appliances, or of the improper loading of cars, shall not be a defense to an action for injury caused thereby, except as to conductors or engineers, in charge of dangerous or unsafe cars, or engines, voluntarily operated by them."

In discussing the constitutionality of the statute, the court said:

"We do not understand the Supreme Court of the United States, in its many decisions on this subject, to mean that the dangerousness of a particular business would be the only basis for distinguishing between the businesses of corporations or individual employers in the classification, but rather that any substantial difference between particular businesses which would serve as a reasonable basis for a classification, allowing the employees in the one case to recover, and in the other case not, is sufficient. This we understand to be the doctrine of the *Ellis* case, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, and of the *Magoun* case, 170 U. S. 293, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594, and of *St. Louis, I. M. & S. R. Co.* v. *Paul,* 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419, in which last case the differences was held to consist in the fact that the corporation was engaged in a public business, and that *the public character of that business made a sufficient difference for upholding that statute.* Whilst this case seems an extension of the doctrine of the *Mackey* case, it is clearly an application of the same principle. *Neither held that the employees of all corporations could be given this right to recover.* One held that the employees of a railroad corporation might be given the right to recover because of the dangerous character of that busi-

ness; the other, that the employees might recover, under the Arkansas statue involved, because 'of the fact that these corporations (railroad) were clothed with a public trust, and discharged duties of public consequence affecting the community at large;' it being said, following the Supreme Court of Arkansas, that 'the regulation, as promoting the public interest in the protection of employees, to the limited extent stated, * * * (was) properly within the power to amend reserved under the State Constitution.' It will be observed that this decision is criticised as pressing the doctrine beyond its utmost legal tension, in a note of Mr. Freeman to this same case at the top of page 181, 62 Am. St. Rep.; but the criticism should be rather of the Supreme Court of Arkansas than of the United States Supreme Court, as we shall show later herein.

"The act of 1898 under review is assailed as violating the Fourteenth Amendment of the Constitution of the United States, because it denies—as alleged—to corporations the equal protection of the laws in two respects: *First,* in that it applies to the employees of all corporations, without reference to any differences in the respective businesses of the corporations; *second,* because it discriminates between employees of natural persons and of corporations, and the argument is put briefly thus by way of illustration: 'Suppose one man has an independent fortune, and has a large body of pine land, say in Clarke County, Mississippi, and being desirous of converting the timber upon these lands into lumber, and recognizing that the sawmill business is hazardous, and likely to impose large liability upon him, he incorporates this business under the name of the Clarke County Sawmilling Company. Alongside of him and his property in Clarke County is an individual owning an equal body of land, who does not see fit to take this precaution. Suppose the boilers of these two sawmills are notoriously weak, and all the employees of both parties are aware of it, and yet they continue to work. Suppose, now, at the same time and from identi-

cally the same cause a boiler explosion takes place in both mills. The Clarke County Sawmilling Company would, under the act of 1898, be mulcted in damages, but the individual would not be liable.' And it is urged that the act applies to all corporations, but to no natural persons, and, *since the natural person and the corporation might be both engaged in precisely the same business, a discrimination in such cases does not rest on any difference in the business.* Possibly the clearest statement of the doctrine contended for by appellee is that stated in *Soon Hing* v. *Crowley,* 113 U. S. 708, 709, 28 L. ed. 1146, 1147, 5 Sup. Ct. Rep. 733, as follows: '*The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws.*' In the *Ellis* case, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, it is said that the classification must always rest upon 'some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily.'

"Multiplied citations from the United States Supreme Court could be made, but the thought running through them all, as we understand them, clearly is that *the classification is not to be made, except upon the basis of some difference between the business of those favored and the business of those not favored—a substantial difference warranting the classification.* We have read critically all the decisions cited in the briefs from the United States Supreme Court without finding any decision holding expressly that a statute providing that the employees of all corporations may so recover can be upheld. We have read carefully, also, the decisions from the State Supreme Courts cited, and others not cited, by counsel. * * *

"We must confess that the argument upholding the constitutionality of the statute before us is exceptional-

ly able, and presents many objections to the view we have stated, but objections all of which we think answerable. • • •

"*Second.* In respect to the cases of *Pittsburgh, C. C. & St. L. R. Co.* v. *Montgomery,* 152 Ind. 1, 49 N. E. 582, and *Tullis* v. *Lake Erie & W. R. Co.,* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136, it is very earnestly insisted that the *Tullis* case, 175 U. S. 350, 44 L. ed. 192, 20 Sup. Ct. Rep. 136, upholds the view that a statute like this, applicable to all corporations, is not unconstitutional; and it is said that these two cases further uphold the view that the court may, by a process of judicial inclusion and exclusion, look to the evidence in each case to determine in that way—from the evidence, showing the nature of the business—whether any particular corporation falls within or without the constitutional line of demarkation. • • •

"We, however, think the meaning of the *Tullis* case is, distinctly, that if the Indiana statute had not had in it, on its face, the words 'railroad corporations', it would have been held by the Supreme Court of the United States unconstitutional. It is true the objection in that case was made that it was unconstitutional because the language, 'railroad corporations and other corporations,' was exactly equivalent to the words 'all corporations,' which would present a statute just like ours. But it is to be distinctly noted that the Indiana Supreme Court held, and the United States Supreme Court counted on that holding, that that objection could not be made by a railroad company; in other words, the Indiana Supreme Court declined to entertain the objection, since the party making the objection was a railroad corporation, and the Supreme Court of the United States accepted the State Supreme Court's construction of its State's statute. The words 'railroad corporation' appearing also on the face of the statute, as to the objection that individuals own railroads, and that, consequently, the Supreme Court of the United States in the *Tullis* case, 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct.

Rep. 136, must be assumed to have held that such legislation is valid, though applying to corporations owning railroads, and not to individuals owning railroads, although both are in exactly the same business, we must confess that it is extremely difficult to make answer for the Supreme Court of the United States. It may be that the instances of individual ownership of interests so vast as railroad interests usually are so very rare as not to have been thought worthy by the Supreme Court of the United States of special consideration, though this surely ought not to affect the principle. *At all events, it is too plain for debate that in all the decisions of the Federal Supreme Court the ground on which such legislation as this has been vindicated is some essential and substantial difference between the businesses of the corporations favored and the businesses of the corporations discriminated against.* * * *

"*Fifth,* it is objected that the United States Supreme Court decisions would uphold this statute upon the ground that it is perfectly competent to confer upon the employees of all corporations these remedies and rights, whilst denying them to natural persons, because, and only because of the fact that they are corporations, the creatures of the state, existing and drawing all their vast privileges from the state. It is said that these considerations constitute such a great difference between the natural person and the corporation as to uphold such legislation. And the *Ellis* case, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, is cited; the court saying there that it was a sufficient answer, in that case, to the argument that the act would be valid if it extended the penalties to all corporations, and that as a matter of fact that statute did not so extend the penalties to all corporations. But this is far from decision to that effect. It is a mere comment *arguendo.*

"Again, it is said that in *Pacific Exp. Co.* v. *Siebert,* 142 U. S. 352, 35 L. ed. 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250, it was held that 'the Constitution is not violated by special legislation, applied equal-

ly to artificial bodies'; and numerous cases are cited from Judge Rose's notes on this case to sustain this proposition. But the perfect answer to this is that all these are cases as to the power of taxation, a subject wholly different from that under investigation here. And this distinction is clearly pointed out in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 562, 46 L. ed. 691, 22 Sup. Ct. Rep. 440, where the court says: 'It is sufficient to say that those cases had reference to the taxing power of the state, and involved considerations that could not, in the nature of things, apply to a state enactment like the one involved in the present case. * * * A state may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States so long as the classification does not invade the rights secured by the Constitution of the United States. But different considerations control when the state by legislation seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade.' * * *

"Our conclusion, after the most careful and protracted consideration, is that Sec. 1 of the act of 1898 (Acts 1898, Chap. 66, p. 85) violates the 14th Amendment of the Constitution of the United States, in that it imposes restrictions upon all corporations, without reference to any difference arising out of the natures of their businesses, which are not imposed upon natural persons, and thus denies to corporations the equal protection of the law. We are, therefore, constrained to declare the said act unconstitutional. The Legislature, soon to meet, can readily frame an appropriate act not open to these objections."

The above case was cited and followed by the Supreme Court of Indiana in *Bedford Quarries Co.* v. *Bough*, 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (n.s.) 418. The court said:

"The portion of Sec. 7083, *supra*, upon which the third paragraph of the complaint is based, reads as

follows: 'That every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases: * * * *Second.* Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee, at the time of the injury, was bound to conform and did conform.' It is urged by appellant that said employer's liability act, except as applied to railroads, is in violation of the 14th Amendment of the Constitution of the United States, and therefore void, for the reason that it imposes burdens upon private corporation employers that are not imposed on individual and co-partnership employers in the same business under the same circumstances and conditions, and gives a right of action to the employees of private corporations that is not granted to the employees of individuals and co-partnerships under like conditions. Appellee insists that the Legislature has the power of classification for legislative purposes, and that the classification in said act was proper.

"The Legislature may make a classification for legislative purposes, but it must have some reasonable basis upon which to stand. It is evident that differences which would serve for a classification for some purposes would furnish no reason for a classification for legislative purposes. Such legislation must not only operate equally upon all within the class, *but the classification must furnish a reason for and justify the making of the class;* that is, the reason for the classification must inhere in the subject-matter, and rest upon some reason which is natural and substantial, and not artificial. Not only must the classification treat all brought under its influence alike, under the same conditions, but it must embrace all of the class to which it is naturally related. Neither mere isolation, nor arbitrary selection, is proper classification. (Citing authorities.) * * *

"While the employer's liability act, so far as it affects private corporations, applies to all within the class named therein, it does not include all of the class to which it is naturally related. Employees of individuals and co-partnerships are excluded from the benefit of its provisions. It gives a right of action to an employee for injuries received while in the service of a private corporation in certain cases, but denies the employee of an individual or co-partnership engaged in the same business a right of action for an injury arising from the same cause and under the same conditions. *It imposes new burdens on private corporations, while natural persons carrying on a like business and under like circumstances and conditions are left without any such burden. The right of action is made to depend upon the character of the employer, and not upon the character of the employment.* In *Ballard* v. *Mississippi Cotton Oil Co., supra*, 'a statute providing that every employee of any corporation shall have the same rights and remedies for an injury suffered by him from an act or omission of the corporation or its employees as are allowed by law to other persons not employees, where the injury results from the negligence of a superior agent or officer, or of a person having the right to direct or control the services of the person injured, and also when the injury results from the negligence of a fellow-servant; and that knowledge of defective appliances by the person injured shall constitute no defense; and that the provisions of the statute shall not be waived by contract (was held) unconstitutional, because it imposes restrictions on all corporations, without reference to any difference arising out of the nature of their business, which are not imposed upon natural persons, and thus denies to corporations the equal protection of the laws.' * * *

"It cannot be denied, however, that in present industrial conditions the co-servant doctrine, which had for its basis, to some extent at least, the idea that the servant could know and estimate the character of his

associates, and that the safety of the common service was promoted by placing that burden on him (Pollock, Torts, pp. 95, 96; Pollock's Essays on Jurisprudence, p. 141; *Farwell* v. *Boston & W. R. Corp.*, 4 Met. 49, 58, 59, 38 Am. Dec. 339, 342, 343), has, when applied to the facts in many cases, become arbitrary, rather than a reasonable rule of law. * * *

"In view of this, everyone must realize that there is a reasonable ground for the essential idea of the employer's liability legislation; *but the fact must not be forgotten that the small industry still exists, and that, under the convenient form of corporate capacity, men still carry on industrial undertakings which are in no essential particular different from those which are carried on by co-partnerships and individuals. It is this fact which makes a classification on the basis of the character of the employer inherently vicious.* True, the corporation under our laws and industrial system, has in it the seeds of tremendous growth; but, as the real evil can be reached by a classification which goes to those elements which, to some extent, have removed the reason for the co-servant rule, *there is not even a color of an excuse for imposing burdens on the corporate employer, while its competitor, a natural person, who is carrying on, under the same conditions, like business, is left without any such burden.* If said corporations, as such, are to have legislative burdens put upon them, as by the law in controversy, then all who ought to be put in their class should be included, or, if this appears to the legislative mind as improper owing to differences in the character of employments, then legislation should have for its basis a classification which rests on such diferences in the various employments as would make a distinction between them appear to be warranted. * * *

"It is claimed, in effect, that the employer's liability act must be treated as an amendment of the law or laws under which railroad and other corporations are organized in this State, and that, when so treated, appellant cannot, if a domestic corporation, object to

the same. Said employer's liability act has been held to apply not only to railroad corporations proper, but to apply to other kinds of corporations, as well as individuals, engaged in the business of operating railroads. *Pittsburgh, C. C. & St. L. R. Co.* v. *Lightheiser*, 168 Ind. 438, 78 N. E. 1033. The words 'other corporations,' used in said act, not only apply to private corporations existing under the laws of this State, but to foreign corporations doing business in this State and in no way indebted to this State for their charters. *The Legislature of this state has no power to alter, amend, or repeal the charter of a foreign corporation, or the law under which it is organized. It is evident, therefore, that said act cannot be regarded as an amendment of the different incorporation laws of this State. Missouri, K. & T. R. Co.* v. *Medaris*, 60 Kan. 151, at page 156, 55 Pac. 875; note to *St. Louis, I. M. & S. R. Co.* v. *Paul*, 62 Am. St. Rep. 181; *Johnson* v. *Goodyear Min. Co.*, 127 Cal. 4, 47 L. R. A. 338, 344, 78 Am. St. Rep. 17, 29-31, 59 Pac. 304. See, also, *State* v. *Haun*, 61 Kan. 146, 149-152, 47 L. R. A. 369, 59 Pac. 340."

In *Chicago, M. & St. P. Ry. Co.* v. *Westby*, 178 Fed. 619, 102 C. C. A. 65, the Eighth Circuit Court of Appeals held invalid a statute of South Dakota, in effect abrogating the fellow-servant rule and providing that contributory negligence should not be a defense but should diminish the damages in case of injury or death of an employee of "every common carrier engaged in trade or commerce in the State of South Dakota." The court held that the term "common carrier" embraced railroads, express companies, telegraph, telephone, omnibuses, cabs, drays, trucks, sleds, boats, and many other vehicles, and that the classification was arbitrary. The court discussed the principles involved at length and cited with approval the case of *Ballard* v. *Mississippi Cotton Oil Company, supra.* While the question de-

cided is not the exact question here, the same principles are involved, and, in fact, that case goes much farther than required in the present case.

Conclusion.

Appellee's whole case is based upon the alleged negligence of a fellow-servant. We believe that we have conclusively demonstrated that the statute upon which the action is based is unconstitutional. This cause should therefore be reversed and remanded with instructions to dismiss.

Respectfully submitted,

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